Editor's note: Reconsideration denied by order dated June 21, 1979

DAVID ROBINSON

IBLA 78-327 Decided September 5, 1978

Appeal from trespass notice OR-010-060 issued by the Oregon State Office, Bureau of Land Management, for severance of timber on public domain lands.

Affirmed as modified and remanded.

1. Rules of Practice: Appeals: Burden of Proof -- Trespass: Generally

   On appeal, an assessment of damages made by BLM for timber trespass will not be disturbed where neither appellant's contentions nor the record prove that BLM determination was in error.

2. Trespass: Measure of Damages

   Where record shows willful trespass on Federal lands located in Oregon, applicable law, as mandated under 43 CFR 9239.0-8, for measure of damages is found in Oregon Revised Statutes 105.810, which prescribes treble damages.

3. Trespass: Measure of Damages

   Proper computation under Oregon Revised Statutes 105.810 of damages for willful timber trespass begins with assessment of actual damages, which are measured by difference between market values of pertinent land before and after severance of trees. Ordinarily, the market value of the trespass timber will reflect the value of the actual damage to the public land. Actual damages are then trebled, and from this amount is subtracted an allowance for

> such salvage as BLM by its own diligence realized or should have realized. The sum allowed in mitigation of damages is that which may be appropriate in a given case.

APPEARANCES: David Robinson, Bonanza, Oregon, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

David Robinson appeals from a February 10, 1977, trespass notice issued against him by the Lakeview, Oregon, District Office, Bureau of Land Management (BLM), for his severance of timber from public domain lands on which he has located several placer mining claims. 1/ See 43 CFR 9239.1. The District Manager alleged the trespass was willful and assessed triple damages of $3,162.

On October 6, 1977, after a report from a private party not otherwise involved herein, BLM officials discovered the severances in issue, which a subsequent cruise showed to be 285 ponderosa pine trees. The forester appraising the market value of these logs indicated that the trees had been felled in the June-August period of 1977. After the BLM discovery, the felled trees remained on the mining claims and were flagged and posted as U.S. Government property.

Three issues are raised in this appeal. First, Robinson alleges in various letters and filings on appeal that an unspecified number of the trees were cut by certain farmers who wished to put him out of business, by loggers working in the area, and by the owner of lands adjacent to the mining claims. Second, he alleges that permits he had received from the Oregon Department of Geology and Mineral Industries allowed him to clear an acre of land per site, and that that agency's regulations provided that "material" removed in the building of access roads to mining sites might be sold or traded for the purpose of obtaining similar material to be used for the construction and maintenance of such roads. Third, because it is not apparent from the face of the record that the method of BLM computation of damages comports with Oregon law, the Board raises sua sponte the issue of the proper amount of damages.

[1] On appeal, an assessment of damages made by the BLM for timber trespass will not be disturbed where neither the appellant's contentions nor the record otherwise prove that the BLM determination was in error. See Hub Lumber Company, A-29527 (Sept. 17, 1963). We do not find credible or substantiated appellant's contention that the trees were felled by other parties. Appellant does not expressly deny on appeal that he cut down trees located on his mining claims.

1/ These lands are situated in sec. 30, T. 37 S., R. 11 E., Willamette meridian, in Klamath County, Oregon.

Indeed, that he did sever at least a part of the trees is implicit in his argument that the Oregon Department of Geology and Mineral Industries permitted him to clear the land and that the State regulations allowed him to sell timber from the land to obtain road building materials. Appellant indicates that he purchased a $240 chain saw under leave of this purported authority. E.g., see appellant's letter of October 28, 1977. Further, the file contains a copy of a June 17, 1976, letter from appellant to the Veteran's Administration asking if it is "all right for a disabled veterans [sic] to sell cord wood for fire, if a disabled veteran needs money for food, clothing, etc."

In an October 14, 1977, memorandum for the files, Barry Stallings, Lost River Area Manager for the BLM, recounted the events of an October 11 meeting with Robinson at the mining claims. In part, Stallings said:

> When asked about the cutting of the trees and selling them for firewood, Robinson said he was clearing for roads. Robinson said he wanted to construct three roads north and south and two roads east and west across his four mining claims. * * * I asked Robinson how wide were the roads, he said forty feet. We looked at the cutting and the trees were just randomly cut. No roads were laid out, some of the cleared areas were 150 feet or more wide with no plan or design to the cutting.
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> * * * I mentioned that this claim was on Federal Land and that the State had no control over the standing trees or their disposition. Robinson kept saying he had to sell the wood to pay for the chain saw he bought. He said this was part of his mining, I told him no it was not. He then said he would not have bought the saw if he couldn't sell the firewood from his claim.

Further, the record contains a handwritten memo from Stallings describing a meeting that he and Art Gerity of the BLM held with appellant on February 23, 1978. The memo reads:

> Art pointed out that only the BLM could give permission to cut trees on the claim and asked Robinson if he still continued to believe different. Robinson stated he had been confused and he would not cut any more trees.
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> When questioned about the trees he had cut, Robinson said he had been cutting trees for 10 years. Art asked him if he had been cutting the trees for

> 10 years, how come the needles haven't fallen off. Robinson said he had burned the wood. He also said a farm called Meadow Lake, Inc., cut most of the trees and also a logger had cut trees on the north boundary. Robinson admitted he had cut just under 300 trees. (Our cruise was 285 trees.)

The memorandum is signed by both Stallings and Gerity.

In view of appellant's admissions, his lack of any express denial that he cut the trees, and the vagueness and lack of corroboration of his charge that some unspecified portion of the trees was felled by other parties, we find that appellant has not shown error in the BLM determination of fact that he felled the trees in issue.

Nor do we find believable appellant's contention that he thought that the permit issued him by the Oregon Department of Geology and Mineral Industries and the regulations of that state agency on road-building materials granted him leave to fell the trees. The permit in issue is titled "Grant of Total Exemption," and states that "the above-named operator is granted an exemption from the requirement for a reclamation plan and a bond for the property described above * * *." Appellant does not describe the logical process he employed in arriving at the conclusion that a state-granted exemption from filing a reclamation plan and bond with the State of Oregon permitted him to fell trees owned by the Federal Government. 2/ The Oregon permit on its face and in bold letters cautions that "This certificate does not relieve the permittee from the requirements of city, county, or other government agency authority." Given the circumstances, appellant's alleged reliance on the permit is so unreasonable that it is not credible.

Our finding as to appellant's allegation that he was allowed under the state regulations to sell timber in furtherance of his road building is similar. Even if we assume arguendo that a reasonable person might believe that the State of Oregon is empowered to convey to a private individual rights in property owned solely by the Federal Government, it is nonetheless clear from the evidence that appellant was not constructing anything remotely resembling roads on the claims. We base this assessment on the October 14,

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2/ Appellant does not allege that he did not know the trees were owned by the Federal Government. In a November 5, 1971, handprinted memo to the files on Robinson's mining claims, Frank W. Snell stated that he informed Robinson in person that "The Government has the right to manage the surface resources on his claims. I informed him that the BLM will sell the timber that is in his way if necessary."

1977, memo, quoted supra, which alleges a random, unplanned cutting of the trees, and on a December 8, 1977, BLM map of the claims indicating a tree-cutting pattern which corroborates the evaluation in the October 14 memo. Accordingly, we find that BLM was correct in its determination that the trespass was willful.

[2] We turn now to consider the question of the proper measure of damages in this case. In 43 CFR 9239.0-8 it is provided:

> The rule of damages to be applied in cases of timber, coal, oil, and other trespass in accordance with the decision of the Supreme Court of the United States in the case of Mason et al. v. United States (260 U.S. 545, 67 L. ed. 396), will be the measure of damages prescribed by the laws of the State in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized.

Since the record shows a willful trespass, 3/ the applicable State law is found in Oregon Revised Statutes 105.810:

> [W]henever any person, without lawful authority, wilfully injures or severs from the land of another any produce thereof or cuts down, girdles, or otherwise injures or carries off any tree, timber or shrub on the land of another person or of the state, county, United States or any public corporation, * * * in an action by such person, * * * the United States, state,

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3/ The alternative to damages for willful trespass is provided for in Oregon Revised Statutes 105.815, which states:

"If, upon the trial of an action included in ORS 105.810, it appears that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, * * * judgment shall be given for double damages."

The Oregon Supreme Court has held that the word "willfully" is synonymous with "knowingly." Brown v. Johnston, 258 Or. 284, 482 P.2d 712, 715; Suislaw Timber Co. v. Russell, 91 Or. 6, 178 P. 214 (1919). In Brown v. Johnston, the court explained that this meant that a plaintiff must "prove either that defendant acted purposely to injure the tree or that * * * defendants' conduct was such that they knew the tree would be injured as a result of their acts."

The evidence, as discussed above, shows that Robinson acted knowingly and purposely to injure the trees in issue, and that he had no probable cause to believe that he had rights in the trees under which he was privileged to fell them.

> county, or public corporation, against the person committing such trespasses if judgment is given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed for the trespass. In any such action, upon plaintiff's proof of his ownership of the premises and the commission by the defendant of any of the acts mentioned in this section, it is prima facie evidence that the acts were committed by the defendant wilfully, intentionally and without plaintiff's consent.

The manner in which BLM arrived at the fair market value for the trespass timber was by assuming that BLM had scheduled a timber sale on an economic unit, and then applying values received in recent comparable sales. This method meets the requisite standards for timber appraisals. The value thus derived, $1,054, was then trebled in accordance with ORS 105.810, relating to willful trespass, and demand for payment of $3,162 was made on Robinson.

[3] Under the Oregon Supreme Court's construction of the statute cited above, the proper computation of damages in a willful timber trespass case begins with a determination of actual damages, which are measured by the difference between the fair market values of the pertinent land before and after the severance of the trees. United States v. Firchau, 234 Or. 241, 380 P.2d 800, 804 (1963); Hampton v. Portland General Electric Co., 268 Or. 121, 519 P.2d 89 (1974). Ordinarily, the market value of the trespass timber will reflect the value of the actual damage to the public land. See United States v. Firchau, supra at 380 P.2d 804; Pedro v. January, 261 Or. 582, 494 P.2d 868, 876 (1972); Savelich Logging Co. v. Preston Mill Co., 265 Or. 456, 509 P.2d 1179, 1183 (1973). Such an approach to actual damages computation has been adopted by the BLM. After actual damages are computed, they are first trebled, and then from this amount is subtracted an allowance for such salvage as the BLM by its own diligence realized or could have realized. See United States v. Firchau, supra at 805; United States v. Hult, 319 F.2d 47 (9th Cir. 1963).

As the Oregon Supreme Court said in United States v. Firchau:

> The principle of mitigation, or, more properly, of the duty of a plaintiff to avoid reasonably avoidable losses following a trespass, is not a part of the statutory scheme expressed in ORS 105.810 and 105.815. It is a principle of common law that has been adopted by the courts because justice requires it. There is no reason why the principle should not apply in statutory trespass cases. Generally, a victim of a trespass may not sit idly by and permit the damages caused by the trespass to be compounded by natural elements or by other causes if, in the

> exercise of slight care, he could prevent such enhanced injury to his land. * * * But the duty upon a plaintiff to suffer some slight inconvenience in protecting himself and his property from enhanced loss after a trespass should not be confused with the primary legal duty of a trespasser to pay for his wrong as of the time it was done. In the liability-creating sense of the word duty, the trespasser's duty is to refrain from doing the wrong. Liability for the wrong may be subject, in some cases, to partial relief, where mitigation can be given effect. The plaintiff, in a situation where mitigation is appropriate, is really under a disability to collect for avoidable losses, rather than under a duty to avoid the losses.
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> Under ORS 105.810 and 105.815, the correct formula to follow in assessing damages is to determine the actual damage to the freehold, then double or treble such damages, as the facts of the case may indicate, then allow such sums in mitigation as may be appropriate in a given case. [Emphasis supplied.]

380 P.2d 804-05.

The record in this case does not show whether the BLM attempted to sell the seized timber, which had been cut up into firewood, or whether the BLM otherwise considered the mitigation doctrine in computing damages owed by Robinson.

Mitigation of damages is a material element in the computation of damages for timber trespass in Oregon. We will remand this case to the State Office for consideration of "such salvage as [BLM], by its own diligence, realized, or could have realized," United States v. Firchau, supra at 805; United States v. Hult, supra; and recomputation of the amount of damages due to the United States for this willful trespass. Cf. Weyerhaeuser Co. (On Reconsideration), 34 IBLA 244 (1978).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the timber

trespass of David Robinson is determined to be willful and the case is remanded to BLM for further action consistent herewith.

Anne Poindexter Lewis
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Douglas E. Henriques
Administrative Judge